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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN GARY SHAW et al.,

Defendants and Appellants.

C068755

(Super. Ct. Nos.
09F1387, 10F3266)

Defendants Jonathan Gary Shaw and Tara Shaw¹ were each convicted of possession of a controlled substance and possession of a device used for smoking a controlled substance after submitting their case based on a preliminary examination transcript. Jonathan was also convicted of possession of a deadly weapon.

¹ To avoid confusion, we will refer to the Shaws by their first names for the remainder of the opinion.

Defendants appeal. Both defendants contend there was insufficient evidence to convict them of possession of a device used for smoking a controlled substance. They assert that the officer's preliminary examination testimony did not establish beyond a reasonable doubt that the device was used for smoking a controlled substance. Separately, Tara argues there was insufficient evidence because the preliminary examination transcript was not formally admitted into evidence during the court trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2010, Special Agent Andrew Torres and Police Detective Rex Berry conducted a probation search at defendants' apartment. During the search, the officers found 0.2 grams of methamphetamine in a utility room and 0.3 grams on the kitchen counter. Also on the kitchen counter was a smoking device. In the bedroom, the officers found a black-colored baton sitting against the wall. During the booking process, jail staff found more methamphetamine in Tara's sock.

Defendants were jointly charged with possession of a controlled substance and possession of a device used for smoking a controlled substance. Jonathan was also charged with possession of a deadly weapon.

In June 2010, a preliminary hearing was held. Special Agent Torres testified he found a useable amount of methamphetamine and a "glass smoking device" on the kitchen counter in defendants' apartment. He also testified he found more methamphetamine in a utility room and a baton in a bedroom.

On February 4, 2011, a trial readiness conference was held, where Jonathan and Tara waived jury trial. They agreed to a court trial for decision on the basis of the preliminary hearing transcript. The prosecutor also put on the record that the case was "effectively going to be a slow plea."

On February 8, 2011, the court trial was held. The prosecutor informed the court there was "a stipulation that the preliminary hearing transcript can be admitted as evidence." The trial court directed that the transcript be marked as an exhibit but then made no other mention of it. The trial then proceeded with testimony from Jonathan about his methamphetamine addiction and the baton found in the bedroom.

The trial court found both defendants guilty of possession of a controlled substance and possession of a device used for smoking a controlled substance. The trial court also found Jonathan guilty of possession of a deadly weapon. Defendants each filed a timely notice of appeal.

DISCUSSION

I

Admission Of The Preliminary Examination Transcript

Tara contends the preliminary hearing transcript cannot be considered as evidence at trial because the trial court failed to say the transcript was "admitted" into evidence. Tara argues that because the only evidence of any smoking device was in the preliminary examination transcript, there was insufficient evidence to convict her of possession of a device used for smoking a controlled substance. This contention is frivolous.

"A defendant who submits his case for decision on the basis of the transcript of the preliminary examination *agrees that the transcript may be considered in lieu of the personal testimony of the witnesses who appeared at the preliminary hearing.* His trial is therefore 'entered upon' when the stipulation to submit the case is accepted by the court. That acceptance is analogous to the swearing of a witness or the reception of evidence This is true whether or not the submission is 'tantamount to a plea of guilty'" ² (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602.) (Italics added.)

Here, at the trial readiness conference, Tara agreed with codefendant Jonathan to waive a jury trial and *stipulated* to a court trial for a decision on the basis of the preliminary examination transcript. When the court trial commenced, the prosecutor stated there was a stipulation that the preliminary examination transcript could be admitted as evidence. Tara did not object. The trial court then had the transcript marked as an exhibit, but because the court neglected to formally say the

² Tara also argues because no assent was given when the prosecutor stated the case was "effectively going to be a slow plea," her agreement to submit the case on the preliminary examination transcript did not constitute a slow plea. She is wrong. The prosecutor's description of the court trial as a "slow plea" is of no legal significance. A slow plea, "the clearest example of [which] is a bargained-for submission on the transcript of a preliminary hearing," "is 'tantamount to a plea of guilty' because 'the guilt of the defendant [is] apparent on the basis of the evidence presented at the preliminary hearing and . . . conviction [is] a foregone conclusion if no defense [is] offered.'" (*People v. Wright* (1987) 43 Cal.3d 487, 496.) That is exactly what happened here.

transcript was "admitted" into evidence, Tara argues that the transcript may not be considered as evidence at trial. When the trial court accepted Tara's stipulation to submit her case for decision based on the preliminary examination transcript at the trial readiness conference, the transcript's contents became evidence. The trial court could base its decision on this evidence because Tara stipulated and agreed to it. It was not necessary for the court to formally say the transcript was "admitted" into evidence *during* the court trial for the transcript to become evidence because the transcript had *already* become a part of the evidence when the court accepted Tara's stipulation to submit her case based on the transcript. (*Bunnell v. Superior Court, supra*, 13 Cal.3d at p. 602.)

II

Sufficiency Of The Evidence

Defendants contend there is insufficient evidence to support their conviction of possession of a device used for smoking a controlled substance because Special Agent Torres's mere description of the smoking device as a "glass smoking device" did not establish beyond a reasonable doubt that the device is one used for smoking a controlled substance such as methamphetamine. Defendants argue that the description, "glass smoking device," without evidence of its purpose, could mean a glass smoking device such as a hookah or a device used legally to smoke tobacco or medical marijuana. We disagree.

When a defendant challenges the sufficiency of evidence to support a conviction, "[o]n appeal, the test of legal

sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. . . . [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution." (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.) Before we can set aside a verdict for insufficiency of the evidence, "'it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].'" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

Viewing the evidence in the light most favorable to the judgment, the record reasonably supports the conclusion that the device the officers found on the kitchen counter was used for smoking a controlled substance, namely, methamphetamine. There was no evidence of any other substance found in the apartment, such as tobacco or medical marijuana, to indicate that the device was used to smoke lawful substances. Instead, the officers found methamphetamine in the apartment. In fact, a useable amount of methamphetamine was found on the *same* kitchen counter as the smoking device. Under these circumstances, there was sufficient evidence for a reasonable trier of fact to conclude the device was being used to smoke the nearby methamphetamine.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

HOCH, J.